United Nations A/64/283

General Assembly

Distr.: General
13 August 2009

Original: English

Sixty-fourth session
Item 82 of the provisional agenda*
Report of the International Law Commission on the work of its sixty-first session

Assistance to special rapporteurs of the International Law Commission

Report of the Secretary-General

Summary

The present report has been prepared pursuant to General Assembly resolution 63/123 of 11 December 2008. It contains information on assistance currently provided to special rapporteurs of the International Law Commission and on practical needs and challenges encountered by these special rapporteurs in their work, taking into account previous decisions of the General Assembly.

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09-45886 (E) 040909

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I. Introduction

1. The present report has been prepared pursuant to paragraph 9 of General Assembly resolution 63/123 of 11 December 2008, in which the Assembly requested the Secretary-General to submit to it, in accordance with the established procedures, and bearing in mind resolution 56/272 of 27 March 2002, a report on the assistance currently provided to members of the International Law Commission who serve as special rapporteurs and options regarding additional support for the work of these special rapporteurs.

II. Role of the special rapporteurs in the work of the Commission

2. Special rapporteurs play a central role in the work of the International Law Commission. The practice of the Commission has been to appoint one of its members to serve as a special rapporteur at the early stage of the consideration of a topic irrespective of whether it is a matter of progressive development or codification.[1] The additional functions of the member of the Commission as special rapporteur continue, as long as the individual remains a member of the Commission, until the Commission has completed its work on the topic. It is the role of the special rapporteur to offer an intellectual vision for the topic, to mark out its contours, to explain existing practice and the state of the law, to make proposals for draft articles in reports on the topic to the Commission, to take into account the views expressed by Member States and, in some instances, international organizations, and to manage the overall development of the Commission's work on the topic, from its initial conception in terms of content and structure to its completion, culminating in the adoption of a final set of draft articles or guidelines with commentary.

3. The special rapporteur performs a variety of tasks ranging from the preparation of reports on the topic, participation in the consideration of the topic in the plenary, elucidation of various aspects of the topic in plenary and in the work of the Drafting Committee, preparation of revised texts of draft articles, as appropriate, to the elaboration of commentaries to draft articles, once such articles are adopted by the Commission. The reports of special rapporteurs form the very basis of work for the Commission and constitute a critical component of the methods and techniques of work of the Commission established under its statute.[2]

4. The tasks of special rapporteurs require extensive independent research and analysis, as well as a serious commitment to stewardship at all stages of the Commission's work on the topic. While the Commission meets in Geneva for a determined period of time, the functions of the special rapporteurs continue throughout the year. In practice, the scheme under the statute of the Commission relies heavily on the work done by special rapporteurs, whose reports, prepared intersessionally, form the basis for the consideration of the various topics by the Commission. The special rapporteurs bear responsibility for the authorship of such reports.

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[1] The statute of the Commission only envisages the appointment of a special rapporteur in the case of progressive development of international law.

[2] See generally, *The Work of the International Law Commission*, vol. I (2007) (seventh edition), (United Nations publication, Sales. No. E.07.V.9).

III. Assistance provided by the secretariat to the Commission and its special rapporteurs

5. Pursuant to article 14 of the statute of the Commission, the Secretary-General of the United Nations provides substantive and technical servicing to the Commission, including providing various forms of assistance to special rapporteurs. Accordingly, the Codification Division of the Office of Legal Affairs of the United Nations serves as the secretariat of the Commission.

6. The type of assistance offered by the secretariat to special rapporteurs should be perceived essentially from two interconnected levels: assistance provided to the Commission as a whole, from which, however, special rapporteurs may benefit in a particular manner, and assistance reserved for individual special rapporteurs in the discharge of their specific responsibilities.

7. Among the various forms of assistance to the Commission in general, the Codification Division undertakes considerable independent research, analytical studies and surveys to facilitate the work of the Commission. Most often the research in question is carried out at the beginning of the work of the Commission on a particular topic, and this in turn provides useful material for the special rapporteurs during the initial stages of their work.[3] Moreover, the Division has been requested to conduct, on an ad hoc basis, research on a specific aspect of a topic to assist the Commission and its special rapporteurs to have a full appreciation of particular legal issues in the development of a topic.[4] At its thirty-second session, in 1980, the Commission noted that the studies and research projects prepared by the Codification Division were part and parcel of the consolidated methods and techniques of work of the Commission and, as such, constituted an indispensable contribution to its work.[5]

8. In some instances, the Commission has also requested the Division to prepare proposals for topics, taking into account existing State practice and the needs of the international community, for inclusion in the Commission's long-term programme of work. The Division also prepares several publications containing analytical summaries of legal developments and related materials, such as the *United Nations Juridical Yearbook*, the *Repertory of Practice of the United Nations*, the *United Nations Legislative Series*, the *United Nations Reports of International Arbitral Awards*, and *Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice*.

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[3] In recent years, such studies have included: the Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (A/CN.4/543); the Memorandum on the effect of armed conflict on treaties (A/CN.4/550 and Corr.1 and 2); the Memorandum on expulsion of aliens (A/CN.4/565); the Memorandum on protection of persons in the event of disasters (A/CN.4/590 and Add.1-3); the Memorandum on immunity of State officials from foreign criminal jurisdiction (A/CN.4/596 and Corr.1); and the Memorandum on reservations to treaties in the context of succession of States (A/CN.4/616).

[4] Survey of State practice, international judicial decisions and doctrine, Study prepared by the secretariat: "Force majeure" and "fortuitous event" as circumstances precluding wrongfulness (A/CN.4/315).

[5] See *Yearbook of the International Law Commission, 1980*, vol. II (Part Two), para. 192; see also the bibliography (in vol. II) for a list of substantive studies undertaken by the secretariat. While there is a synergy for the overall work of the Commission, the studies and surveys by the secretariat are independent of reports of the special rapporteurs and, in the nature of the work of the Commission, are not intended to be a replacement thereof.

9. The Division facilitates the interaction between the Commission and Member States. The Division prepares topical summaries of the debates of the Sixth Committee on the annual reports of the Commission, from which the Commission, its subsidiary bodies and special rapporteurs greatly benefit. The Division also prepares analytical compilations of written comments and observations of Governments (and in some instances of international organizations) with respect to specific issues on which comments would be of particular interest to the Commission and its special rapporteurs, as well as on the draft articles adopted by the Commission.

10. The Division prepares the statements of the Chairman of the Drafting Committee, which reflect the legislative history of the draft articles in the Drafting Committee and are therefore indispensable in the preparation of commentaries by the special rapporteurs.

11. Besides the scheduling and the substantive organization of meetings of the Commission and its subsidiary bodies, the Division keeps records of proceedings and maintains a historical archive, including an elaborate and fully searchable website containing information on the entire body of work of the Commission, aimed primarily at facilitating the work of the Commission and its special rapporteurs.

12. The assistance of the Codification Division reserved for special rapporteurs includes assigning a staff member to follow and monitor developments on a particular topic on the agenda of the Commission. Individual special rapporteurs work closely with the staff members during the various stages of development of their topics. Any research assistance given, upon request, to special rapporteurs, such as collecting evidence of State practice, doctrinal material and jurisprudence or conducting research on a particular issue, is subsumed in the overall activities of the Division. The staff members also perform editorial, research and referencing tasks with respect to the reports prepared by special rapporteurs. The staff members may also assist with the preparation of the commentary to draft articles at the request of the special rapporteurs who remain primarily responsible for the commentary.[6]

13. During the present quinquennium, provision of assistance has been extended to eight special rapporteurs on the following topics, which are at various stages of their consideration by the Commission: (a) reservations to treaties; (b) responsibility of international organizations; (c) shared natural resources; (d) effects of armed conflicts on treaties; (e) expulsion of aliens; (f) the obligation to extradite or prosecute (*aut dedere aut judicare*); (g) protection of persons in the event of disasters; and (h) Immunity of State officials from foreign criminal jurisdiction.

14. From the onset, the Commission has recognized the untiring efforts of its secretariat.[7] It has acknowledged that the importance of the role of the Codification Division in the work of the Commission rested not only on the high quality of expertise of the members of the Division, their hard work and commitment to the Commission, but also in the fact that the members of the Division were involved in dealing both with the content and substance of work, as well as with the procedural

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[6] See *Yearbook of the International Law Commission, 1996*, vol. II (Part Two), para. 234; see also article 20 of the statute of the International Law Commission.

[7] See *Yearbook of the International Law Commission, 1949*, vol. I, para. 43, and subsequent reports of the Commission.

and technical aspects of servicing, which provided continuous and useful interaction and feedback between the Commission and its secretariat. Moreover, the fact that the Codification Division also serves as the secretariat of the Sixth Committee provided an invaluable and irreplaceable link between the Commission and the Sixth Committee. The Codification Division was thus in a position to be a source of information and unique expertise mutually beneficial for both bodies.[8] The role of the Codification Division has also been acknowledged in numerous resolutions of the General Assembly on the annual reports of the Commission.[9]

IV. Challenges to the work of special rapporteurs of the International Law Commission

15. The practical needs of the special rapporteurs are necessarily determined by the requirements of the statute of the Commission. The statutory responsibilities of the Commission and its character as an expert body of persons of recognized competence in international law with the object of promoting the progressive development of international law and its codification make it imperative to retain the distinct role of the Commission, as an expert deliberative body of the General Assembly, as compared to the work of the secretariat.

16. In view of the distinct nature of the functioning of the Commission under its statute and the role envisaged therein for the special rapporteurs, there are certain activities that naturally exceed the type of assistance or intellectual input that the secretariat is expected to provide.

17. Special rapporteurs have different professional backgrounds and responsibilities and are appointed taking into account the different regional groups that are reflected in the composition of the Commission as a whole. Once the session of the Commission is concluded, the members resume their other functions while the special rapporteurs, in addition to their regular professional occupation, continue work on their topics throughout the year. The special rapporteurs conduct research and prepare reports on their topics which must be submitted before the next session of the Commission. The requirement of independence in the performance of their functions has the consequence for the special rapporteurs that they carry out their tasks separately from their other professional responsibilities, in parallel with, but often at the expense of, their professional activities. In many instances, this has involved personal sacrifices on the part of special rapporteurs in terms of time and resources. As the Commission assumes increasing responsibility for topics that are multidisciplinary, coupled with the paucity of readily available practice, research work on particular topics has involved travel and contacts with individuals and institutions with particular expertise on the specific topics in question or with access to particular information.

18. In some instances, special rapporteurs are located in places where accessibility to primary research materials and resources is difficult and expensive. Thus, there have been situations in which individual special rapporteurs have used their personal resources for research activities or have foregone travel entitlements to make detours to conduct research elsewhere on their way to or from Geneva. This

[8] Statement of the Chairman of the Commission in the Sixth Committee, in 2003 (A/C.6/58/SR.14).

[9] See General Assembly resolution 63/123, para. 20.

places an additional burden on the special rapporteurs, particularly when the Commission is out of session, as they are required to prepare reports analysing complex questions of international law in readiness for the next session of the Commission. The use of research assistance in situ (under the direct supervision of a special rapporteur), beyond what can practically be provided by the secretariat, has always been an essential component of the work of the special rapporteur in preparing reports intersessionally.

V. Recognition by the General Assembly of the service of the special rapporteurs to the Commission

19. The unique role of special rapporteurs in the work of the Commission was recognized quite early by the General Assembly, when it initially authorized on an exceptional basis the payment of research grants to special rapporteurs and subsequently decided that special allowances be granted on an exceptional basis to all members of the Commission.[10] It was the specific provision in the statute of the Commission concerning the appointment of members of the Commission, as special rapporteurs on selected topics, that led the Fifth Committee in 1949 to recommend to the General Assembly, as an exception, the payment of research project grants, in the form of honoraria, to these special rapporteurs. Payment of such honoraria was conditional upon the submission of a report. In the debates in the Fifth Committee, the Chairman of the Advisory Committee on Administrative and Budgetary Questions noted that special rapporteurs prepared drafts and working papers to assist the Commission, which not only saved the Commission's time during sessions, but also demanded extra work and time on the part of seasoned legal authorities.[11]

20. Special allowances were accorded pursuant to General Assembly resolution 485 (V) of 12 December 1950.[12] By its terms, the General Assembly amended

[10] At its fourth session (1949), the General Assembly authorized the annual payment of honoraria to the Chairman and the special rapporteurs of the Commission in respect of work performed by them between sessions.

[11] See *Official Records of the General Assembly, Fourth Session, Fifth Committee, Summary Records of Meetings*, 20 September-8 December 1949, 208th Meeting, 26 October 1949.

[12] Paragraph 2 of resolution 485 (V), introduced by way of an amendment in plenary, fixed the special allowance at a specific rate per day. Pursuant to its resolution 231 (III) of 8 October 1948, the General Assembly had also identified the categories of representatives to the General Assembly and members of commissions, committees and other bodies, in respect of which travel expenses and subsistence allowances should be paid. The resolution of the Assembly was a response to concerns raised in the Commission, at its first (1949) and second (1950) sessions, regarding the adequacy of the allowance as envisaged under article 13 in its original formulation. In particular, it was noted by the Commission that its work, if its sessions stretched for a period of at least two months each year, would entail the sacrifice of a substantial part of the income of each member and an even greater sacrifice for those who were asked to serve as special rapporteurs, as they would be required to carry out extensive work intersessionally. Viewing it as crucial in the interest of the work of the Commission that its members were enabled to devote the necessary time to the Commission's work and, at the same time, to make service in the Commission less onerous financially, it was thus suggested that the General Assembly reconsider the terms of article 13; see Report of the International Law Commission to the General Assembly, *Yearbook of the International Law Commission*, 1949, chap. VII, para. 42; and ibid., 1950, vol. II, para. 21.

article 13 of the statute of the Commission to its current statutory formulation providing for special allowances to members of the Commission so that they were able to devote the necessary time to the Commission's work and, at the same time, to make service in the Commission less onerous financially.[13] The payments were designed not so much to compensate adequately the individuals concerned for their services as to acknowledge in a token manner the substantial sacrifice of time or of financial interest on the part of the individuals concerned.

21. Reviews of the system of payment to members of expert bodies were undertaken by the General Assembly at its ninth (1954), twelfth (1957), sixteenth (1961), twenty-third (1968), thirtieth (1975) and thirty-fifth (1980) sessions.[14] One effect of such reviews was to combine into one the two elements, which informed the General Assembly to accord research grants to special rapporteurs and special allowances to members of the Commission.[15] Consequently, when in 2002 the honoraria was pegged at US$ 1 per year for all members of the Commission, the prior distinction between research grants and special allowances disappeared from the overall picture.[16]

22. Since 2002, the International Law Commission has repeatedly drawn the attention of the General Assembly to the impact of resolution 56/272 of 27 March 2002,[17] emphasizing in particular that the resolution affects the special rapporteurs, especially those from developing countries, as it compromises support for their

[13] "Members of the Commission shall be paid travel expenses, and shall also receive a special allowance, the amount of which shall be determined by the General Assembly", article 13, statute of the International Law Commission (General Assembly resolution 485 (V)).

[14] These reviews were conducted on the basis of comprehensive reports submitted by the Secretary-General *Official Records of the General Assembly, Twelfth Session, Annexes*, agenda item 41, document A/C.5/713, and the Advisory Committee on Administrative and Budgetary Questions, ibid., document A/3705. The Fifth Committee, at its 613th and 615th meetings on 25 and 29 October 1957, respectively, reviewed the system of honoraria and special allowances — as distinct from and in addition to subsistence allowances at established, uniform rates — and recommended a system of payments to members of experts bodies; ibid., document A/3766, para. 6, which was approved by the General Assembly at its 729th plenary meeting on 13 December 1957. See also, for example, General Assembly resolutions 875 A (IX) of 4 December 1954; 1075 (XI) of 7 December 1956; 1798 (XVII) of 11 December 1962; 2489 (XXIII) of 21 December 1968; 3536 (XXX) of 17 December 1975; 35/218 of 17 December 1980 and resolution 56/272.

[15] The system of payment to members of expert bodies of the United Nations adopted after the 1957 review consisted of two types of payment, namely (a) subsistence allowance; and (b) payments additional to subsistence allowance for already authorized cases, but converted into lump-sum payments, based on the normal duration of the meetings of the bodies concerned. The latter payments were henceforth considered "honoraria".

[16] In resolution 56/272, the General Assembly decided, with effect from 6 April 2002, to set, at a level of US$ 1 per year, all honoraria currently payable on an exceptional basis to the members of the International Law Commission, the International Narcotics Control Board, the United Nations Administrative Tribunal, the Human Rights Committee, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child. Related transfers were effected in the provision of Internet services as set out in paragraph 5 of resolution 56/254 D of 27 March 2002, by the terms of which the Secretary-General was requested to restore immediately Internet services, including web hosting, e-mail and support services, to permanent missions, utilizing the resources released as a result of resolution 56/272.

[17] See A/57/10, paras. 525-531; A/58/10, para. 447; A/59/10, para. 369; A/60/10, para. 501; A/61/10, para. 269; A/62/10, para. 379; and A/63/10, para. 358.

research work. It has urged the General Assembly to reconsider this matter, with a view to restoring the honoraria for special rapporteurs.

VI. Conclusion

23. The reports prepared by special rapporteurs are intended to assist the Commission in its statutory responsibilities. A considerable amount of time and resources are devoted to the preparation of such reports. The present report has highlighted that very early on the General Assembly recognized the unique responsibility placed on special rapporteurs of the Commission and, as an exception, authorized the payment of research project grants, in the form of honoraria. The underlying preoccupation that inspired the Assembly at its fourth session to pay honoraria to special rapporteurs for studies prepared between sessions still has resonance and the provision of research project grants for the work done by special rapporteurs is worthy of consideration.

24. However, it should be noted that decisions by the General Assembly of changes for special rapporteurs that result in financial implications would have to be taken in the overall context of the earlier decision of the General Assembly in its resolution 56/272.